

1989

# D and H Real Estate Company v. The Public Service Commission of the State of Utah : Brief of Petitioner

Utah Supreme Court

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Lon Rodney Kump; Richards, Bird and Kump, a P.C..

David Stott; Attorney for the Public Service Commission; R. Paul Vam Dam; Utah Attorney General; Bernard M. Tanner; Assistant Attorney General; Attorneys for the Respondent.

---

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DOCKET NO.

UTAH SUPREME COURT

BRIEF.

890036

BEFORE THE SUPREME COURT

OF THE STATE OF UTAH

---

D AND H REAL ESTATE COMPANY,	:	
dba D AND H TRUCKING,	:	
	:	
Applicant and Petitioner,	:	
	:	CASE NO. 890036
vs.	:	
	:	
PUBLIC SERVICE COMMISSION OF	:	
UTAH: BRIAN T. STEWART,	:	CATEGORY NO. 9
Chairman; BRENT H. CAMERON,	:	
Commissioner; and JAMES M.	:	
BYRNE, Commissioner; DIVISION	:	
OF PUBLIC UTILITIES, DEPARTMENT	:	P.S.C.U. CASE NO. 88-960-01
OF BUSINESS REGULATION, STATE	:	
OF UTAH,	:	
	:	
Respondents.	:	

---

BRIEF OF PETITIONER

---

PETITION FOR REVIEW OF A DENIAL OF AN APPLICATION  
BY THE PUBLIC SERVICE COMMISSION OF UTAH

---

DAVID L. STOTT  
Public Service Commission  
of Utah  
4th Floor Heber M. Wells Bldg.  
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Salt Lake City, Utah 84145

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Assistant Attorney General  
236 State Capitol Building  
Salt Lake City, Utah 84114

Attorneys for Respondents

BEFORE THE SUPREME COURT

OF THE STATE OF UTAH

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D AND H REAL ESTATE COMPANY,  
dba D AND H TRUCKING,

Applicant and Petitioner,

vs.

PUBLIC SERVICE COMMISSION OF  
UTAH: BRIAN T. STEWART,  
Chairman; BRENT H. CAMERON,  
Commissioner; and JAMES M.  
BYRNE, Commissioner; DIVISION  
OF PUBLIC UTILITIES, DEPARTMENT  
OF BUSINESS REGULATION, STATE  
OF UTAH,

Respondents.

CASE NO. 890036

CATEGORY NO. 9

P.S.C.U. CASE NO. 88-960-01

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Salt Lake City, Utah 84114

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**LIST OF ALL PARTIES TO THE PROCEEDING**

See cover sheet.

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## **BRIEF STATEMENT SHOWING JURISDICTION OF SUPREME COURT**

Section 78-2-2(3)(e)(i), Utah Code Annotated (1953, as Amended), and Section 63-46(b)-16 of the Administrative Procedures Act, Utah Code Annotated (1953, as Amended), confer appellate jurisdiction upon the Supreme Court of Utah to review the final Order of the Public Service Commission of Utah (herein "Commission") which denied the application of D and H Real Estate Co. dba D and H Trucking (herein "applicant").

## **STATEMENT OF ISSUES PRESENTED FOR REVIEW**

Was applicant substantially prejudiced by the Commission's acting beyond its jurisdiction and erroneously applying the law?

## **STATUTES WHOSE INTERPRETATION IS DETERMINATIVE**

Section 54-6-31, Utah Code Annotated:

### **54-6-31. Contract carrier -- Permit application.**

(1) No contract motor carrier may operate as a carrier in intrastate commerce without first being issued a permit by the commission.

(2) Verified application for a permit shall be made to the commission in writing, and be in a form and contain information the commission requires.

(3) The commission shall establish filing fees and require their payment upon filing of an application.

(4) The commission may implement modified hearing procedures as provided in this chapter to implement the transportation policy of § 54-6-2.

(5) If a hearing is necessary the commission, upon the filing of an application for a permit, shall fix a time and place, which may not be fewer than 30 days

after the filing. The commission shall cause notice of the hearing to be served at least ten business days before the hearing upon an officer, owner, or agent of every common and contract carrier that is operating, or has applied for a permit to operate, in the area and service proposed to be served by the applicant, and on other interested parties as determined by the commission.

(6) Public notice of application shall be made in a newspaper of general circulation throughout the state at the expense of the applicant. The applicant shall make known the entire scope of its application.

Section 54-6-32, Utah Code Annotated:

**54-6-32. Standards for granting permit.**

(1) Except as provided in Subsection (3), the commission shall grant an application for a contract motor carrier permit, in whole or in part, if it finds that:

(a) the carrier has entered into a contract, or presents satisfactory evidence that the carrier will enter into a contract, with the shipper or shippers to be served by the permit.

(b) a prima facie case of being fit, willing, and able, including the applicant's financial and safety fitness, and the ability to meet insurance requirements defined in § 54-6-42; and

(c) on the basis of evidence presented by the applicant and by persons supporting the issuance of the permit, the service will be consistent with the public interest.

(2) If the commission finds from the evidence presented by the applicant and persons supporting the issuance of the permit that it is consistent with the public interest to authorize all or part of the proposed service, it may issue the permit for the full or partial exercise of the privilege sought, and may attach to the exercise of the privilege terms and conditions it considers to be in the public interest.

(3) If the commission finds, on the basis of evidence presented by persons objecting to the issuance of a



permit, that the transportation to be authorized by the permit is inconsistent with the public interest, the permit shall be denied.

(4) The existence of a carrier in the service or area sought, who possesses authority similar to that sought, or the diversion of revenue or traffic away from an existing carrier is not, in and of itself, inconsistent with the public interest and is not cause for denial of the issuance of the permit.

#### **STATEMENT OF THE CASE**

At the hearing before an Administrative Law Judge of the Commission, applicant was not allowed to produce any evidence. The Commission determined that notice of the application should be republished for the purpose of obtaining protestants. There were no protestants following the original publication, which was in accordance with the statute and the Commission's Rules.

#### **STATEMENT OF THE FACTS**

Applicant D and H Trucking filed an application for a contract carrier permit with the Public Service Commission of Utah on July 12, 1988 (R. 1-45). Contemporaneously filed was a request for a temporary emergency permit (R. 4; Addendum, pp. 13-14). The application was verified (R. 6) and contained a Verified Certification of Shipper Support executed by Trans-West Shippers Association (R. 40-42).

The Notice of Filing of the application was published in the Salt Lake Tribune on July 27 and July 28, 1988 (R. 55)

(Addendum, p. 17). This notice stated that applicant seeks authority to operate

"As a contract carrier by motor vehicle for the transportation of the following commodities: general commodities. Serving the following areas: Between all points and places in the State of Utah under contract with Trans-West Shippers Association." (R. 55)

This publication complied with the Commission's Rules of Practice. It followed the form supplied in the application package of the Commission (Addendum, pp. 15-16).

A Notice of Hearing set the application for hearing September 28, 1988 at 9:00 o'clock a.m. in the Hearing Room of the Public Service Commission before an Administrative Law Judge (R. 48). At the outset applicant restrictively amended its application against the transportation of hazardous materials and explosives (R. 58).

At the hearing the Administrative Law Judge refused to take any evidence and granted a motion made by the attorney for the Division of Public Utilities to dismiss the application (R. 56).

The Commission then issued a Conditional Order of Dismissal on November 18, 1988 (R. 57-60; Addendum, pp. 18-20). On December 16, 1988, applicant filed a Request for Review and Petition for Rehearing (R. 67-84). The Commission issued an Order Denying Rehearing on January 5, 1989 (R. 85-91; Addendum, pp. 21-25). The Commission has never acted upon the request for a temporary

emergency permit.

### **SUMMARY OF ARGUMENT**

1. The Commission arbitrarily and capriciously refused to listen to any evidence at the hearing.

2. The Commission's denial of the application is contrary to law.

### **ARGUMENT**

#### **I**

#### **THE COMMISSION ARBITRARILY AND CAPRICIOUSLY REFUSED TO LISTEN TO ANY EVIDENCE AT THE HEARING**

Following publication in accordance with the statute and the Commission's Rules, no protests were filed to the granting of this application. The Division of Public Utilities (herein "Division") had the matter set for hearing based upon its request that it could "marshall its position in opposition to the proposed grant of authority" (last sentence, R. 51).

At the hearing the Division showed no interest in finding out the facts from the applicant and its supporting shipper. It moved to dismiss the application before hearing any evidence.

The bias of the Division in this proceeding is exemplified by its Memorandum dated September 21, 1989 (R. 50-51). This Memorandum is not verified and was not served upon the applicant's attorney.

But for the fact that "The main presence in this application is Hardy Roberts of P.B.I." (unverified memorandum of Division of Public Utilities delivered to the Administrative Law Judge prior to the hearing herein--but not served on applicant's counsel), this application would have been summarily granted by the Commission.

The Commission routinely grants applications without hearing following publication of the notice of the application--where no protests are filed.

No protests were filed to this application after publication in accordance with the Commission's Rules. Nevertheless, the Commission refused to hear any evidence--after setting the matter for hearing. The Administrative Law Judge did so based upon his determination that applicant's supporting shipper ". . . includes potentially every citizen and other legal entity of Utah" (R. 64).

Utah statutes allow such authority. Mary A. Murphy v. Public Service Commission of Utah, 30 Utah 2d 140, 514 P.2d 804 (1973). Why should the Division and the Commission try to drum up opposition after the matter has been set for hearing unless they are prejudiced and biased against the applicant?

It was arbitrary and capricious for the Commission to refuse to hear any evidence and deny the application. The only basis for the refusal is an obvious bias and prejudice against Hardy Roberts, an officer of the applicant.

Another example of the prejudice against applicant

is the failure of the Commission to ever act on the emergency temporary authority application filed contemporaneously with the application (R. 4). The Commission has never acted on this request for emergency temporary authority. It has not been granted or denied. It was the last page of the application and is not contained in the Record of Proceedings herein. A copy is attached in the Addendum of this Brief (Addendum, pp. 13-14).

It was arbitrary and capricious for the Commission to refuse to hear the evidence in this proceeding.

## II

### **THE COMMISSION'S DENIAL OF THE APPLICATION IS CONTRARY TO LAW**

In passing the Motor Carrier Act of 1986, the Utah State Legislature stated that it was their intent "to promote competition; \* \* \*" (§ 54-6-2(c) of Utah Code Annotated).

In granting a contract carrier permit, a hearing is not necessarily required. § 54-6-31 of Utah Code Annotated requires a hearing only if deemed necessary by the Commission. It is common practice for the Commission to summarily grant a contract carrier permit based upon the verified application and shipper support where there have been no protests filed following publication.

In making standards for the granting of the permit sought by applicant in this proceeding, the Legislature expressly

stated that the Commission shall grant an application if it finds:  
(a) the carrier has entered into a contract (which applicant has done and the contract was attached to the application in this proceeding) (R. 12-22), (b) a prima facie case of being fit, willing and able (all of which evidence was supplied by applicant to the Division prior to the hearing in this proceeding), and (c) on the basis of evidence presented that the service will be consistent with the public interest (which applicant had shown in the verified application (R. 1-45) and shipper support (R. 37-42) and was prepared to confirm at the hearing with its President and supporting shipper). (§ 54-6-32 of Utah Code Annotated)

The Legislature went further and stated specifically:

"(4) The existence of a carrier in the service or area sought, who possesses authority similar to that sought, or the diversion of revenue or traffic away from an existing carrier is not, in and of itself, inconsistent with the public interest and is not cause for denial of the issuance of the permit." (§ 54-6-32, Standards for Granting Contract Carrier Permit, Utah Code Annotated)

In spite of this direct legislative pronouncement, the Conditional Order of Dismissal not only required republication of the notice specifying that the Shipper's Association includes potentially every citizen and commercial enterprise in Utah and also provided:

". . . in the event applicant elects to republish, the Commission shall cause notice of any hearing to be served on all common general commodities and household goods carriers

having statewide authority . . ." (R. 59)

The Commission's attempt to drum up public opposition to an application which had no protestants is not only contrary to the Utah Motor Carrier Act, it is contrary to all the current pronouncements of the Utah Supreme Court. In the recent decision of Spreader Specialists, Inc. v. Public Service Commission of Utah, 60 Utah Adv.Rep. 24 (June 23, 1987), the Supreme Court of Utah reversed a decision of the Commission denying the application. The Supreme Court did so upon the grounds that the Commission had failed to follow the Supreme Court's directions in Big K Corp. v. Public Service Commission, 689 P.2d 1349 (Utah 1984). The court in Spreader stated:

"In the instant case, it appears that the Commission denied the application primarily because of the potential diversion of income from existing carriers, despite the fact that we had stated in Big K that 'the fact that additional competition will divert revenues from existing carriers is not a valid reason by itself to justify a denial of additional authority.'"

In Milne Truck Lines v. Public Service Commission, 720 P.2d 1373 (Utah 1986), the Utah Supreme Court affirmed its rejection of a policy that protects existing carriers in favor of a policy that encourages industry competition. See Utah Law Review 1988, No. 1 at Page 259. In the Milne proceeding, the Court again reversed the Public Service Commission and held that the Commission had used an incorrect standard when it refused

to grant a common carrier license. The Utah Law Review states that Milne marks the culmination of legislative and judicial movement toward deregulation of Utah's intrastate trucking industry.

In spite of these pronouncements by the Legislature and by the Supreme Court of Utah, the Commission in this proceeding attempts to drum up protestants from existing carriers who received notice in conformance with Utah statutes and did not choose to protest the application. The Commission's denial of this unprotested application is contrary to all recent decisions of this Court. It is counter to the policy of the State Legislature in promoting competition.

### CONCLUSION

The Commission arbitrarily and capriciously denied the application of applicant D and H Trucking without hearing any evidence at the time set for hearing. The Commission did so on a basis which ignores the legislative intent as expressed in the Motor Carrier Act of 1986 and all of the recent pronouncements of the Supreme Court of the State of Utah.

WHEREFORE, it is respectfully requested that the Supreme Court of Utah direct the defendant Commission to issue a contract carrier permit to applicant D and H Trucking to transport general commodities (except hazardous materials and explosives) between all points and places in the State of Utah under contract with



Trans-West Shippers Association.

DATED this 17th day of April, 1989.

Respectfully submitted,

RICHARDS, BIRD & KUMP, a P.C.

By: Lon Rodney Kump  
Lon Rodney Kump  
333 East Fourth South  
Salt Lake City, UT 84111-2988  
Telephone: (801) 328-8987

Attorneys for Petitioner

**ADDENDUM**

Copy of the Application for a Temporary Permit filed on July 12, 1988 by the applicant contemporaneously with the application. The record should have this Form A-29 at page 46. It was the last page of the application. ....	13
Copy of form Notice of Filing contained in the Commission's application package .....	15
Copy of the published Notice of Filing .....	17
Copy of the Conditional Order of Dismissal .....	18
Copy of the Order Denying Rehearing .....	21

Form A-29

BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH

Application for Temporary, Seasonal, or Emergency Permit, or Certificate  
under Title 54-6-37, Utah Code Annotated, 1953 as amended

Date: \_\_\_\_\_

Case No: \_\_\_\_\_

1. Name of Applicant: D AND H REAL ESTATE CO. dba D AND H TRUCKING

2. Address of Applicant: 960 North 1200 West, Orem, UT 84057

3. Phone No.: 801-225-8200

4. Application is for: Common \_\_\_\_\_ Contract x

5. If Contract Application, Name and Address of Parties to the Agreement:

Trans-West Shippers Association

1122 West 150 North

Orem, UT 84057

6. Commodities to be Transported: General Commodities

7. Areas to be Served: All points in Utah

8. Necessity for Temporary Authority: Customer request - no comparable service now available within Utah. There is no currently authorized motor carrier in the State of Utah which offers a U-Load, We Haul type of service. This service is available to members of Trans-West Shippers Association under Interstate Commerce Commission authority

NOTE

THE GRANTING OF THIS AUTHORITY CREATES NO PRESUMPTION THAT CORRESPONDING  
PERMANENT AUTHORITY WILL BE GRANTED.

AFFIDAVIT

State of Utah

: ss.

County of Salt Lake

HARDY G. ROBERTS, being first duly sworn, on oath  
deposes and says:

That he is the President of the within named applicant; that he  
has read the foregoing application, knows the contents thereof, and the same  
is true to the best of his knowledge, information and belief.

Hardy G. Roberts

Subscribed and sworn to me before this 12 day of July, 1938

Notary Public

My Commission Expires: 4-4-39

-----  
Equipment inspected by \_\_\_\_\_

(Granted) (Denied) \_\_\_\_\_  
Commissioner

No. of permit or certificate granted \_\_\_\_\_

Exhibit J

S A M P L E

- BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH -  
-----

In the Matter of the Application of	)	
_____	)	CASE NO. 8 - _____
_____	)	
for Authority to Operate as a	)	NOTICE OF FILING
_____ Carrier of Property	)	
in Intrastate Commerce.	)	

-----

ISSUED: \_\_\_\_\_

NOTICE IS HEREBY GIVEN that the above-referenced company has filed an Application with the Public Service Commission of Utah. Applicant proposes to operate as follows:

That the applicant proposes to operate as a \_\_\_\_\_ Contract or \_\_\_\_\_ Common Carrier by motor vehicle for the transportation of the following commodities: \_\_\_\_\_

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

Serving the following areas:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

Any person wishing to protest said application, or otherwise intervene in the proceedings, must file a written protest or notice of intervention with the Commission, Heber M. Wells State Office Building, 160 East 300 South, Salt Lake City, Utah, 84111, within ten (10) business days of the date of the first publication.

Said protest must include a statement that the Protestant either: (a) holds a certificate in good standing as a common carrier authorizing all or part of the service for which authority is sought, and has transported or solicited traffic on a regular and ongoing basis within the scope of the application during the 12-month period immediately preceding initiation of the proceeding and is willing and able to provide service that meets the reasonable needs of the passengers or shippers involved; or (b) has pending before the Commission an application, filed prior in time to the application being considered, for substantially the same traffic. The protest shall also describe any adverse effect the granting of the application would have on protestant.

CASE NO. 8 - -  
- 2 -

Notice of intervention or protest shall include the above case number and name, the Protestant's or Intervenor's interest in the case, and any direct relief desired.

Failure to file a written protest or notice within the allotted time will result in a denial of permission to appear and participate in the hearing on this matter, which will be scheduled subsequently with no further public notice.

Intervenors and Protestants must be prepared to demonstrate at the hearing how the case affects their interests as well as the public interest.

For further information, contact the Commission at Fourth Floor, Heber M. Wells State Office Building, Salt Lake City, Utah.

BY ORDER OF THE COMMISSION.

DATED at Salt Lake City, Utah, this \_\_\_\_\_ day  
of \_\_\_\_\_, 19

ATTORNEY'S OR APPLICANT'S NAME  
ADDRESS

## Affidavit of Publication

STATE OF UTAH. )  
 County of Salt Lake )

Notices

Legal Notices

I, Diana Hale

Hereby certify that the attached  
 advertisement of NOTICE OF FILING CASE NO. 88-960-01 BEFORE T  
 for RICHARDS, BIRD & KUMP was published by the

NEWSPAPER AGENCY CORPORATION, AGENT FOR THE SALT LAKE  
 TRINE and DESERET NEWS, daily newspapers printed in the English  
 language with general circulation in Utah, and published in Salt Lake City, Salt  
 County in the State of Utah

## NOTICE OF FILING

CASE NO. 88-960-01

BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH  
 Matter of the Application of D AND H REAL ESTATE CO. dba  
 TRUCKING for Authority to Operate as a Contract Car-  
 rier in Intrastate Commerce  
 NOTICE IS HEREBY GIVEN that the above-referenced com-  
 missioner has filed an Application with the Public Service Commis-  
 sion. Applicant proposes to operate as follows:  
 Contract carrier by motor vehicle for the transportation  
 of following commodities: general commodities  
 between the following areas: Between all points and places in  
 the State of Utah under contract with Trans-West Shippers Assn.

Any person wishing to protest said application, or otherwise  
 intervene in the proceedings, must file a written protest or notice  
 of intervention with the Commission, Heber M. Wells State Office  
 150 East 300 South, Salt Lake City, Utah 84111, within ten  
 business days of the date of the first publication.  
 A protest must include a statement that the Protester  
 holds a certificate in good standing as a common  
 carrier, authorizing all or part of the service for which authority is  
 being protested, and has transported or solicited traffic on a regular and  
 basis within the scope of the Application during the 12-  
 month period immediately preceding initiation of the proceed-  
 ings, is willing and able to provide service that meets the  
 needs of the passengers or shippers involved, or  
 pending before the Commission an application filed  
 with the application being considered for substan-  
 tial same traffic. The protest shall also describe any ad-  
 verse effect the granting of the Application would have on pro-

tection of intervention or protest shall include the above  
 name and name of the Protester's or Intervenor's interest  
 in the case, and any direct relief desired.  
 Failure to file a written protest or notice within the allotted  
 time shall result in a denial of permission to appear and partici-  
 pate in the hearing on this matter, which will be scheduled  
 at a later date with no further public notice.  
 Protestors and Intervenor's must be prepared to demon-  
 strate during the hearing how the case affects their interests as well  
 as the public interest.

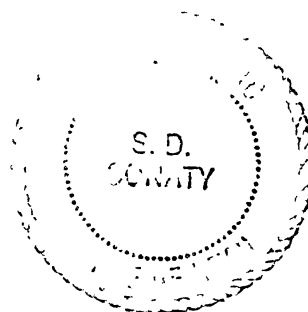
For further information, contact the Commission at Fourth  
 Heber M. Wells State Office Building, Salt Lake City, Utah  
 DEPARTMENT OF THE COMMISSION

at Salt Lake City, Utah this 18th day of July, 1988  
 ATTORNEY OF RECORD  
 S. LON RODNEY KUMP  
 333 East Fourth South  
 Salt Lake City, Utah 84111  
 Telephone: (801) 328-8987

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S.D. Donahy  
 NOTARY PUBLIC

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 RESIDING IN SALT LAKE COUNTY



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SCHEDULE		MISC CHARGES		
1988		.00		
CAPTION	SIZE	TIMES	RATE	AD CHARGE
NOTICE OF FILING CASE NO. 88-	2 COL.	32 LINES	2	1.34
DUE AND PAYABLE ON RECEIPT OF THIS INVOICE				191.36
FOR BILLING INFORMATION CALL 801-237-2796				
TOTAL AMOUNT DUE				191.36

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 SALT LAKE CITY, UT 84111

ACCOUNT NUMBER	BILLING DATE
LE-3288987	07/29/88
AD NUMBER	
R29	191.36

- BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH -

-----  
In the Matter of the Applica- )  
tion of D AND H REAL ESTATE )  
COMPANY, dba D AND H TRUCKING, )  
for Authority to Operate as a )  
Motor Carrier of Property in )  
Intrastate Commerce. )

DOCKET NO. 88-960-01

CONDITIONAL ORDER OF  
DISMISSAL

-----  
ISSUED: November 13, 1988

SYNOPSIS

The Applicant, D and H Real Estate Co., dba D and H Trucking, filed its application on July 12, 1988, seeking motor carrier authority. At a hearing on September 28, 1988, the Commission ordered republication of Applicant's Notice of Filing, to which Applicant objected. The Commission grants Applicant ten days to republish or have its application dismissed.

Appearances:

James L. Barker	For	Division of Public Utilities, Department of Business Regulation, State of Utah
Lon Rodney Kump	"	Applicant

By the Commission:

PROCEDURAL HISTORY

The Applicant, D and H Real Estate Company, dba D and H Trucking, filed its application on July 12, 1988, seeking motor carrier authority as follows:

To operate as a contract carrier by motor vehicle for the transportation of general commodities between all points in the state of Utah under contract with Trans-West Shippers Association.



On July 27, 1988, the Regulated Carrier Section, Division of Public Utilities ("Division") requested clarification from the Applicant as to the nature of Trans-West Shippers Association and indicated that four additional items were required to complete the application. On September 15, 1988, the matter was noticed for a hearing to convene on September 28, 1988. On September 26, 1988, the Division filed with the Commission a Memorandum setting forth the reasons it intended to oppose the application.

The matter came on for hearing on September 28, 1988 before Kent Walgren, Administrative Law Judge for the Commission. At the hearing, Applicant moved to Amend its application to delete authority for hazardous materials and explosives, but indicated it was continuing to seek authority to haul all other general commodities (including household goods, heavy haul, etc.).

At the hearing, Applicant also filed with the Commission its Affidavit of Publication (Notice of Filing). The Notice of Filing does not specify that Trans-West Shippers Association includes potentially every citizen and other legal entity of Utah.

After receiving a proffer on the nature of Trans-West Shippers Association and hearing oral arguments, the Administrative Law Judge concluded that Applicant's Notice of Filing had not given sufficient notice of the scope of its application as required by U.C.A. Section 54-6-31(6), as amended, and ordered republication. Applicant objected to republication and indicated that it would not comply with a Commission directive ordering same. Thereupon, the Division moved to dismiss the application for Applicant's failure to give sufficient public notice.

Approved and confirmed this 18th day of November, 1988,  
as the Report and Order of the Public Service Commission of Utah.

/s/ Brian T. Stewart, Chairman

(SEAL)

/s/ Brent H. Cameron, Commissioner

/s/ James M. Byrne, Commissioner

Attest:

/s/ Stephen C. Hewlett, Commission Secretary

RECEIVED

- BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH -

JAN 6 1989

RICHARDS, B.F.  
& KULP

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In the Matter of the	)	<u>DOCKET NO. 88-960-01</u>
Application of D AND H REAL	)	
ESTATE CO., dba D AND H	)	
TRUCKING, for Authority to	)	<u>ORDER DENYING REHEARING</u>
Operate as a Motor Carrier	)	
of Property in Intrastate	)	
Commerce.	)	

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ISSUED: January 5, 1988

BY THE COMMISSION:

The Commission issued its Conditional Order of Dismissal in this matter on November 18, 1988. Applicant failed to republish within the ten (10) days of the issuance of the Order, whereupon the Application was automatically dismissed. On December 16, 1988, Applicant filed a Request for Review and Petition for Rehearing ("Request for Rehearing") pursuant to U.S.A. Section 63-46b-12, as amended. This review is undertaken by the Commission pursuant to U.C.A. Sections 63-46b-12 and 54-7-15, as amended. The Commission, having carefully reviewed the Request for Rehearing, now issues the following:

ISSUES REVIEWED

Although Applicant raises numerous issues in its Request for Rehearing, the essence of its position is that it published its Notice of Filing in technical conformance with Rule R750-150-3.D.2; that there were no public protests; that it is fit, willing and able to provide the service; and that, therefore, the Application must be summarily granted. Applicant ignores the Commission's duty to assure

The Commission concluded that Applicant's Notice of Filing had not reasonably communicated to potential protestants the substance of the Application and required republication. It is to that issue and the question of public interest that this Order is addressed.

FINDINGS OF FACT

1. Applicant filed its Application for authority on July 12, 1988 with the Commission. Applicant published a Notice of Filing on July 27 and 28, 1988 in the Salt Lake Tribune. That notice indicates that Applicant proposes to operate

As a contract carrier by motor vehicle for the transportation of the following commodities: general commodities. Serving the following areas: Between all points and places in the state of Utah under contract with Trans-West Shippers Association.

The published Notice of Filing does not communicate to potential protestants the following: (a) that Trans-West Shippers Association is a non-profit entity composed of numerous members (shippers) (see Contract and Addendum to Contract, dated January 5, 1981, filed with Application); (b) that Applicant (Shipper) will be involved in soliciting members for Trans-West (see Addendum to Contract, dated January 5, 1981, filed with Application). We find that the foregoing are relevant facts which potential protestants are entitled to be made aware of in determining whether or not to protest an Application. In addition, the published Notice of Filing does not mention that rates are to be set by Trans-West (the Shippers), and not Applicant (the Carrier) (see Exhibit B to Application). Having determined, on the basis of the Application itself, that republication would be required before proceeding to a hearing on the merits

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of the Application (mandated by the protest filed by the Regulated Carrier Section of the Division of Public Utilities--see the Division's Memorandum filed with the Commission on September 26, 1988), the Administrative Law Judge asked Applicant if Trans-West could not potentially include every citizen of the state of Utah. Applicant did not deny the possibility and requested permission to call a number of witnesses to testify. Having already concluded from review of the Application that republication was necessary before proceeding further, the Administrative Law Judge found no basis for taking further evidence at that time.

2. In view of the nature of the authority requested by Applicant, which appears after examination of the Application to be more in the nature of "open-ended" contract authority than the traditional contract authority involving one carrier and only one shipper, there is a substantial question of public interest which needs to be addressed at a full hearing. For example, if granted the authority prayed for, Applicant would not be required to file or abide by a tariff (as are the certificated common carriers of household goods who generally serve the public at large). Before the public policy issues can be addressed, parties having a potential interest in the proceeding have a right to be reasonably notified.

3. We find nothing in the record indicating that the Administrative Law Judge was prejudiced by the Division of Public Utilities.

CONCLUSIONS OF LAW

1. Although Applicant technically complied with the requirements of Rule R750-150-3.D.2., the Commission may require further notification pursuant to Rules R750-150-3.D.5 and R750-150-3.D.5. Parties having a potential interest in a proceeding are entitled to receive reasonable and adequate notice of that proceeding. In this instance, Applicant's Notice of Filing did not reasonably and adequately provide notice of the proceeding to potential protestants.

2. U.C.A. Section 54-6-32(1)(c), as amended, states that the Commission shall grant an application for a contract motor permit...if it finds that:

(c) on the basis of evidence presented by the Applicant and by persons supporting the issuance of the permit, the service will be consistent with the public interest.

The Commission entered no findings or conclusions as to whether the Application was consistent with the public interest, but did conclude that prior to a hearing on that issue potentially interested parties were entitled to notice of the proceeding.

3. The Application should be dismissed without prejudice.

ORDER

NOW, THEREFORE, IT IS HEREBY ORDERED, that Applicant's Request for Review and Petition for Rehearing be, and the same hereby is, denied.

IT IS FURTHER ORDERED that Applicant be, and the same hereby is, permitted to re-file its Application at any time. In the alterna-

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tive, Applicant may seek judicial review of this Order pursuant to U.C.A. Sections 63-46b-14, 54-7-15, and 78-2-2(3)(e)(i), as amended.

DATED in Salt Lake City, Utah this 5th day of January 1989.

/s/ Brian T. Stewart, Chairman

(SEAL)

/s/ Brent H. Cameron, Commissioner

/s/ James M. Byrne, Commissioner

ATTEST:

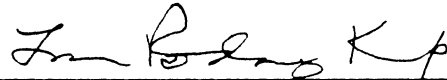
/s/ Stephen C. Hewlett  
Commission Secretary

**CERTIFICATE OF SERVICE**

This is to certify the foregoing BRIEF OF PETITIONER was served on the defendants/respondents this 17th day of April, 1989, by mailing four (4) true and correct copies thereof via United States Mail with postage prepaid thereon to the following:

David L. Stott, Esquire  
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4th Floor Heber M. Wells Bldg.  
160 East 300 South  
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